

# IX. Ukrainian Courts in Dialogue on International Law

Ivanna Kolisnyk\*

## 1. Introduction

The focus of this study is the application of international law by Ukrainian courts. The aim of the article is to explore the role of domestic courts in protection of the rule of law through international law and to determine the trends in judicial dialogue; in other words, how often and in what situations national courts engage in dialogues with international courts. When doing so, the author attempted to highlight possible problems and practical challenges to dialogue, such as access to judgments, translations, commentaries, etc. Equally importantly, this paper also seeks to explore if and how judicial dialogue impacts international law, and whether it should do so at all. In order to aid in answering this final question factors such as personal attitudes of judges, the frequency with which courts consider international matters, procedural and regional differences are taken into account.

---

\* PhD candidate, Institute of Law Studies of the Polish Academy of Sciences.

## 2. The Legal Basis for Application of International Law in a Domestic Legal System

There is no doubt that one can observe an increasing significance of the global legal order, which should ensure the security of States and their cooperation on the basis of international law and relevant legal systems. For Ukraine, an independent State since 24 August 1991, the global order is of particular importance inasmuch as it ensures the establishment and maintenance of diplomatic relations with other sovereign states, cooperation with international organizations, the promotion of Ukraine's national interests and the protection of the rights of its citizens and diaspora abroad. Ukraine's integration into the world community has always been the main factor determining the trend of further development of the national law.

### 2.1. The Status of International Law within the Ukrainian Constitutional Framework

In the light of the growing impact of international law on both domestic and international affairs, the search for an understanding of the relationship between international and national legal systems becomes essential in order to address many legal and political questions. First references to the relationship between international law and national law in Ukraine can be found in the Declaration on State Sovereignty of Ukraine adopted on 16 July 1990:<sup>1</sup>

The Ukrainian SSR recognizes the pre-eminence of general human values over class values and the priority of generally accepted standards of international law over standards of internal state law.<sup>2</sup>

Only three decisions of the Constitutional Court of Ukraine referred to the 1990 Declaration on State Sovereignty of Ukraine. In two of them, the Declaration was mentioned in relation to events which had taken place before the adoption of the Constitution. In 2003 the Court refused to provide for interpretation of the Declaration, requested by members of the Parliament, because of the lack of competence.<sup>3</sup> The Act of Declaration of the Independence of Ukraine of 24 August 1991

<sup>1</sup> Verkhovna Rada, The Declaration on State Sovereignty of Ukraine (Document No. 55–12) (16 July 1990), <<http://zakon1.rada.gov.ua/laws/show/55-12>> (access: 12 February 2016).

<sup>2</sup> Art. 10(3) of the Declaration on State Sovereignty of Ukraine.

<sup>3</sup> Case 31-y/2003 (Constitutional Court, 8 May 2003) at para. 3: "Constitution of Ukraine establishes a list of types of acts, whose official interpretation is within the powers of the Constitutional Court of Ukraine. The Declaration referred to is not the act which according to Art. 150 of the Constitution of Ukraine can be a subject-matter of an official interpretation of the Constitutional Court of Ukraine", <<http://zakon1.rada.gov.ua/laws/show/v031u710-03>> (access: 15 February 2016).

has not been referred to in the Constitutional Court of Ukraine jurisprudence to the moment.

The Constitution of Ukraine (adopted and in force since 28 June 1996) as a fundamental source of Ukrainian law does not determine directly the place of international law in the domestic legal order. However, the importance of its provisions on this issue cannot be ignored.

Article 18 of the Ukrainian Constitution establishes that:

The foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law.<sup>4</sup>

Although Art. 18 of the Constitution directly refers to the “generally recognized principles and norms of international law” used in the context of determination of the foundations of the Ukraine’s foreign policy, the Constitution of Ukraine does not have any references to the international customary law. As for international treaties, it is worthy to note that Ukraine is a country with a parliamentary-presidential (mixed) system of government where ratification of international agreements lies generally in the competence of the parliament and the right to sign the treaties is divided between the President and the government.<sup>5</sup>

According to the Constitution of Ukraine, the President of Ukraine “represents the state in international relations, administers the foreign political activity of the State,<sup>6</sup> conducts negotiations and concludes international treaties of Ukraine.”<sup>7</sup> The Verkhovna Rada of Ukraine (the national parliament) is responsible for approving of international treaties and has also the authority of denouncing international treaties:

The authority of Verkhovna Rada comprises: granting consent to the binding character of international treaties of Ukraine within the term established by law, and denouncing international treaties of Ukraine.<sup>8</sup>

<sup>4</sup> Art. 18 of the Constitution of Ukraine, <[http://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution\\_en.asp](http://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution_en.asp)> (access: 15 February 2016).

<sup>5</sup> О.І. Белова, ‘Міжнародний договір як правова основа зовнішньоекономічних відносин України’ (2009) 22 Ученые записки Таврического национального университета им. В.И. Вернадского, Серия “Юридические науки” 205.

<sup>6</sup> Art. 18 of the Constitution of Ukraine (n. 4) determines that “the foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law.”

<sup>7</sup> Art. 106(3) of the Constitution of Ukraine (n. 4).

<sup>8</sup> Art. 85(32) of the Constitution of Ukraine (n. 4): “The authority of Verkhovna Rada comprises: granting consent to the binding character of international treaties of Ukraine, and denouncing international treaties of Ukraine.”

Once the Verkhovna Rada grants its consent, international treaties become part of the national legislation of Ukraine, binding the courts, the Government and private persons. The Law of Ukraine “On international treaties of Ukraine”<sup>9</sup> dated 29 June 2004 describes the ratification process in detail. According to this procedure the Ministry of Foreign Affairs of Ukraine submits to the President the proposal of the ratification of an international agreement together with relevant documents.<sup>10</sup> After consideration of such proposal, the President of Ukraine submits to Verkhovna Rada legislative proposal for the ratification law.<sup>11</sup> When Verkhovna Rada of Ukraine adopts such law, it is transferred then to the President of Ukraine who is obliged to sign it within 15 days. The law on ratification comes into force after its publication in the Official Gazette.<sup>12</sup> Simultaneously, the ratification documents have to be signed by the Chairman of the Verkhovna Rada of Ukraine and countersigned by the Minister of Foreign Affairs.<sup>13</sup>

The application of international law in the national legal system requires the determination of its place in the system of sources of law of Ukraine. It is worthy to note that the Constitution of Ukraine as well as most of the Ukrainian legislation does not use the term ‘source of law’ and does not have any references to it. As regards the hierarchy of international law *vis-à-vis* the norms of domestic law, the 1996 Ukrainian Constitution stipulates only that:

International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.<sup>14</sup>

Therefore, in accordance with the Ukrainian Constitution, only such international agreements that were duly ratified by the Verkhovna Rada can be considered as a part of the Ukrainian legal order. However, at the constitutional level Ukraine does not proclaim that international treaties take priority over contrary domestic legislation. The supremacy of certain international treaties over contrary Ukrainian legislation has been established only in the Law on international treaties of Ukraine.<sup>15</sup> Article 19(2) of the Law on international treaties of Ukraine states that “if an international treaty of Ukraine that has entered into force establishes other rules than those provided in the legislation of Ukraine, then the rules of the

<sup>9</sup> The Law of Ukraine No. 1906-IV on international treaties of Ukraine (29 June 2004), <<http://zakon1.rada.gov.ua/laws/show/1906-15>> (access: 15 January 2016).

<sup>10</sup> Ibidem, Art. 9(5).

<sup>11</sup> Ibidem, Art. 9(6).

<sup>12</sup> Ibidem, Art. 21.

<sup>13</sup> Ibidem, Art. 13.

<sup>14</sup> Art. 9 of the Constitution of Ukraine (n. 4).

<sup>15</sup> Law No. 1906-IV on international treaties of Ukraine (29 June 2004), <<http://zakon1.rada.gov.ua/laws/show/1906-15>> (access: 15 February 2016).

international treaty should be applied.”<sup>16</sup> Pursuant to the Article 19(1) of the Law “on international treaties of Ukraine”, the international treaties that are in force, confirmed by the Verkhovna Rada of Ukraine are a part of the national legislation of Ukraine and should be applied in the order established for the national legislation standards.<sup>17</sup> So within the hierarchy of sources of Ukrainian law the ratified international agreements occupy a layer below the Ukrainian Constitution<sup>18</sup> and above Ukrainian statutory laws and acts of government. It means that even a duly ratified international agreement cannot overrule conflicting provisions of the Ukrainian Constitution but in case of conflict with statutory laws and acts of government relevant provisions of a duly ratified international agreement shall prevail.

Another important provision on this issue appears in Chapter XII of the Constitution of Ukraine determining the status of and rules for the “Constitutional Court of Ukraine” which in Article 151 determines:

The Constitutional Court of Ukraine, on the appeal of the President of Ukraine or the Cabinet of Ministers of Ukraine, provides opinions on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature.<sup>19</sup>

Taking into consideration the authority of the Constitutional Court of Ukraine to provide opinions on the conformity of international treaties that are in force as well as international treaties submitted to the Parliament with the Constitution of Ukraine, one can note that Ukrainian Constitutional Court has not only the preventive jurisdiction over the constitutionality of treaties, but it can also call a treaty unconstitutional after the ratification instrument has been provided on behalf of Ukraine.

Article 55 of the Constitution of Ukraine refers to the right of every Ukrainian citizen to appeal for the protection of his rights and freedoms to the international judicial institutions or to the bodies of international organisations:

After exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.<sup>20</sup>

<sup>16</sup> Ibidem, Art. 19(2).

<sup>17</sup> Ibidem, Art. 19(1).

<sup>18</sup> Art. 8 of the Constitution of Ukraine (n. 4) provides that: “The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it. The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed.”

<sup>19</sup> Art. 151(1) of the Constitution of Ukraine (n. 4).

<sup>20</sup> Art. 55(4) of the Constitution of Ukraine (n. 4).

## 2.2. Legislative Provisions Regarding the Implementation of International Law within the National Legal System

The actual status of international law in the Ukrainian legal system is determined not only by the constitutional provisions, but also by the willingness of domestic courts to rely on that body of law. The laws of Ukraine usually contain rules and procedures regarding application of international law within the Ukrainian legal system.

### 2.2.1. The Law on International Treaties of Ukraine

The Law on International Treaties of Ukraine<sup>21</sup> that replaced the Laws of Ukraine “On Effect of International Treaties on the Territory of Ukraine” (1992) and “On International Treaties of Ukraine” (1994), lays down the general rules on the application of the international conventional obligations in Ukrainian legal order.

In Article 1 the Law provides (establishes) its scope of application:

This law shall apply to all international treaties of Ukraine governed by international law and concluded in accordance with the Constitution of Ukraine and the requirements of this Law.<sup>22</sup>

In Article 2 the Law defines the term ‘international treaty of Ukraine’ following the definition of the ‘treaty’ of Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties:

[An international agreement] concluded in written form with foreign State or other subject of international law, which is governed by international law, whether the treaty is embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, agreement, convention, pact, protocol etc.).<sup>23</sup>

Also the law classifies the international treaties of Ukraine depending on the state authority that concludes the treaty – the President (on behalf of Ukraine), the Cabinet of Ministers (on behalf of the Government of Ukraine), the ministries or other central executive authorities (interministerial treaties). This classification determines the procedure to be followed when the relevant international treaty is concluded.<sup>24</sup>

The majority of the Law’s provisions concerns the procedures of the international agreements’ conclusion (Articles 4–14),<sup>25</sup> promulgation, registration and depositing (Articles 21–23), termination, and suspension (Articles 24–27).

<sup>21</sup> The Law of Ukraine No. 1906-IV on international treaties of Ukraine (n. 9).

<sup>22</sup> Ibidem, Art. 1.

<sup>23</sup> The Law of Ukraine No. 1906-IV on international treaties of Ukraine (n. 9), Art. 2(1).

<sup>24</sup> Ibidem, Art. 3.

<sup>25</sup> In this regard, the Presidential Decrees provide for endorsement by the President of Ukraine or the Ministry of Foreign Affairs of activities relating to negotiations

The Law distinguishes performance and application of international treaties. The first relates to their application by the State authorities with a view to ensure observance of Ukraine's treaty obligations as a subject of international law (Arts. 15–16) with the co-ordinating role of the Ministry of Foreign Affairs (Art. 17). The second concerns application of international treaties as source of the legal rules in the Ukrainian legal order:

1. International treaties of Ukraine that are in force, consent to which binding character was granted by the Verkhovna Rada of Ukraine, are part of the national legislation and shall apply in the manner provided for norms of the national legislation.
2. If the international treaty of Ukraine that has entered into force establishes other rules than those provided in the legislation of Ukraine, then the rules of the international treaty should be applied.

### 2.2.2. The procedural laws of Ukraine

The procedural laws of Ukraine establish rules of procedure for the relevant jurisdiction as well as for specific rules on application of international law by the relevant courts. Each procedural law provides for an autonomous complex of rules relating to application of international (and foreign) law and to implementation of international legal co-operation by the relevant courts.<sup>26</sup>

Each procedural code contains similar provisions on judicial review of the judgements following the decision of the international judicial institution (in practice, the European Court of Human Rights) on violation by Ukraine of its international legal obligations. Such review is carried out by the Supreme Court of Ukraine on appeal from an applicant, in whose favour the international judicial institution took decision.

#### 2.2.2.1. The Civil Procedural Code of Ukraine<sup>27</sup>

Article 2 of the Civil Procedural Code of Ukraine states that civil justice in Ukraine is exercised in accordance with the Constitution of Ukraine, this Code and the Law of Ukraine “On International Private Law”. Also, if an international

---

and conclusion of international agreements by the ministries and other central executive authorities (Decree No. 841/96 of 18 September 1996, <<http://zakon1.rada.gov.ua/laws/show/841/96>> (access: 15 July 2016)) and independent regulatory authorities (Decree No. 306/2012 of 8 May 2012, <<http://zakon1.rada.gov.ua/laws/show/306/2012>> (access: 20 February 2016)).

<sup>26</sup> Usually, these laws cover such issues as (1) application of various sources of international law to procedural matters and to merits, (2) the place of international law in the hierarchy of Ukrainian law sources, (3) the review of the judgements following the decision of the international judicial institution on violation by Ukraine of its international legal obligations, (4) international judicial and legal co-operation, (5) execution of judgements of foreign courts in Ukraine.

<sup>27</sup> Law of Ukraine No. 1618-IV Civil Procedural Code (18 March 2004), <<http://zakon1.rada.gov.ua/laws/show/1618-15>> (access: 15 July 2016) (Civil Procedural Code of Ukraine).

treaty, ratified by the Verkhovna Rada of Ukraine, provides for other rules than those laid down by this Code, the rules of an international treaty shall be applied:

1. Civil proceedings are carried out according to the Constitution of Ukraine, this Code and the Law of Ukraine "On International Private Law".
2. If an international treaty, consent to which binding character was granted by the Verkhovna Rada of Ukraine, provides for rules other than those established by this Code, the rules of an international treaty shall apply.<sup>28</sup>

Pursuant to the Article 8 of the Civil Procesural Code of Ukraine, the Court solves the cases according to the Constitution of Ukraine, the laws of Ukraine and international treaties, ratified by the Verkhovna Rada of Ukraine:

The court decides cases in accordance with the Constitution of Ukraine, laws of Ukraine and international treaties, the binding character of which was granted by the consent of the Verkhovna Rada of Ukraine.<sup>29</sup>

Also the court may apply other legal acts adopted by the appropriate authority on the ground of within the authority and in a way established by the Constitution and the laws of Ukraine. If a legal act is not in conformity with the law of Ukraine or international agreement, ratified by the Verkhovna Rada of Ukraine, the court should apply the act of legislation, which has a higher legal force.

In case of incompatibility of the legal act with the law of Ukraine or the international treaty, consent to which binding character was granted by the Verkhovna Rada of Ukraine, the court shall apply the act of legislation, which has higher legal force.<sup>30</sup>

If the Law of Ukraine is not in conformity with the international agreement ratified by the Verkhovna Rada of Ukraine, the court shall apply the international treaty: "In case of incompatibility of the Law of Ukraine with the international treaty, consent to which binding character was granted by the Verkhovna Rada of Ukraine, the court applies the international treaty."<sup>31</sup>

The rules of law of other states are applied by the court in cases when it is established by the Law of Ukraine or International Agreements, ratified by the Verkhovna Rada of Ukraine:

The court applies legal rules of other States in case where it is established by the law of Ukraine or the international treaty, consent to which binding character was granted by the Verkhovna Rada of Ukraine.<sup>32</sup>

<sup>28</sup> Ibidem, Art. 2(2).

<sup>29</sup> Ibidem, Art. 8(1).

<sup>30</sup> Ibidem, Art. 8(4).

<sup>31</sup> Ibidem, Art. 8(5).

<sup>32</sup> Ibidem.



### 2.2.2.2. The Criminal Procedural Code of Ukraine<sup>33</sup>

The order of criminal proceedings in the territory of Ukraine is determined only by the criminal procedural legislation of Ukraine,<sup>34</sup> which consists of the relevant provisions of the Constitution of Ukraine, international treaties, the binding character of which was consented to by the Verkhovna Rada of Ukraine, this Code and other laws of Ukraine.<sup>35</sup>

In criminal proceedings, the court, the investigating judge, the prosecutor, the head of the pretrial investigation authority, the investigator, other officials of public authorities are obliged to strictly abide by the requirements of the Constitution of Ukraine, of this Code, of the international treaties ratified by the Verkhovna Rada of Ukraine and by the requirements of other acts of legislation.<sup>36</sup>

In case the provisions of the Criminal Procedural Code of Ukraine are contrary to the international treaty, which binding character was consented to by the Verkhovna Rada of Ukraine, the provisions of the relevant international treaty of Ukraine shall apply.<sup>37</sup>

The criminal procedural legislation of Ukraine shall apply subject to practice of the European Court of Human Rights.<sup>38</sup>

### 2.2.2.3. The Commercial Procedural Code of Ukraine<sup>39</sup>

The commercial court resolves commercial disputes on the basis of the Constitution of Ukraine, this Code, other legislative acts of Ukraine, international treaties whose binding character was consented to by the Verkhovna Rada of Ukraine.<sup>40</sup>

If in international treaties of Ukraine whose binding character was consented to by the Verkhovna Rada of Ukraine, other rules than those stipulated in the legislation of Ukraine are established, the rules of an international treaty shall apply.<sup>41</sup> Commercial courts, in cases provided by the law or the international treaty, shall apply legal norms of other States.<sup>42</sup>

In the absence of legislation governing contentious relationships with a foreign business entity, a commercial court may apply international commercial customs.<sup>43</sup>

<sup>33</sup> Law of Ukraine No. 4651-VI The Criminal Procedural Code (13 April 2012), <<http://zakon1.rada.gov.ua/laws/show/4651-17>> (access: 22 February 2016) (The Criminal Procedural Code of Ukraine).

<sup>34</sup> Ibidem, Art. 1(1).

<sup>35</sup> Ibidem, Art. 1(2).

<sup>36</sup> Ibidem, Art. 9(1).

<sup>37</sup> Ibidem, Art. 9(4).

<sup>38</sup> Ibidem, Art. 9(5).

<sup>39</sup> Law of Ukraine No. 1798-XII Criminal Procedural Code (6 November 1991), <<http://zakon1.rada.gov.ua/laws/show/1798-12>> (access: 23 February 2016) (The Commercial Procedural Code of Ukraine).

<sup>40</sup> Ibidem, Art. 4(1).

<sup>41</sup> Ibidem, Art. 4(3).

<sup>42</sup> Ibidem, Art. 4(4).

<sup>43</sup> Ibidem, Art. 4(5).

#### 2.2.2.4. The Code of Administrative Proceedings of Ukraine<sup>44</sup>

Administrative proceedings shall be conducted in accordance with the Constitution of Ukraine, this Code and the international treaties whose binding character was constented to by the Verkhovna Rada of Ukraine.<sup>45</sup>

The court in deciding the case shall be governed by the principle of legality, according to which:

- 1) the court shall decide the cases in accordance with the Constitution and laws of Ukraine, as well as the international treaties, consent to which binding character was granted by the Verkhovna Rada of Ukraine;
- 2) the court shall apply other legal normative acts, adopted by the appropriate authority on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine.<sup>46</sup>

In case of incompatibility of a legal normative act with the Constitution of Ukraine, the Law of Ukraine, the international treaty whose binding character was consented to by the Verkhovna Rada of Ukraine, or other legal act, a court shall apply a legal act which has a higher legal force.<sup>47</sup>

If the international treaty, whose binding character was consented to by the Verkhovna Rada of Ukraine, establishes other rules than those prescribed by the law, the rules of the international treaty shall apply.<sup>48</sup>

It is easy to note that Ukrainian procedural codes contain quite similar provisions on the application of international treaties and international law. Therefore, Ukrainian courts are obliged to apply the international law by all these provisions and to give the priority to the ratified international treaties in case of conflict with national laws.

#### 2.2.3. The Law of Ukraine on Execution of Decisions and Application of Practice of the European Court of Human Rights

The Law of Ukraine on execution of decisions and application of practice of the European Court of Human Rights<sup>49</sup> dated 23 February 2006 is of particular importance for application of international law. It is the first document of this type in the Council of Europe. Ukraine is also the first State party to the European Convention on Protection of Human Rights and Fundamental Freedoms,

<sup>44</sup> Law of Ukraine No. 2747-IV The Code of Administrative Proceedings (6 July 2005), <<http://zakon1.rada.gov.ua/laws/show/2747-15>> (access: 24 February 2016).

<sup>45</sup> Ibidem, Art. 5(1).

<sup>46</sup> Ibidem, Art. 9(1).

<sup>47</sup> Ibidem, Art. 9(4).

<sup>48</sup> Ibidem, Art. 9(6).

<sup>49</sup> Law of Ukraine No. 3477-IV on execution of decisions and application of practice of the European Court of Human Right (23 February 2006), <<http://zakon1.rada.gov.ua/laws/show/3477-15>> (access: 1 March 2016).

that has adopted special law on execution of the European Court's of Human Rights decisions.

This Law regulates conditions under which the State is to enforce judgments of the European Court of Human Rights in cases against Ukraine, the necessity to eliminate the causes of a violation by Ukraine of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, the need to implement European human-rights standards in the legal and administrative practice of Ukraine; and the necessity to create conditions to reduce the number of applications against Ukraine before the European Court of Human Rights.<sup>50</sup>

Pursuant to Article 2 of the Law on execution of decisions and application of practice of the European Court of Human Rights, the ECHR's judgment are to be binding and enforceable for Ukraine in accordance with Article 46 of the Convention.<sup>51</sup> The procedure for enforcement of the judgment is to be determined by this Law, the Enforcement Proceedings Law, and by other regulations, having regard to the specific provisions of the present Law.<sup>52</sup>

In Article 17 the Law on execution of decisions and application of practice of the European Court of Human Rights contains provision on application of the Courts' case-law stating that "the courts in trying cases shall apply the Convention and the Court's case-law as source of law."<sup>53</sup> Article 18 provides for detailed rules on the usage of the Ukrainian translations and of the original texts of the Court's decisions.

In the light of these provisions, Ukrainian courts are directly bound by the the ECtHR case law by the mere fact of Ukraine's accession to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the Law on execution of the decisions and implementation of practice of the European Court of Human Rights. Nevertheless, in the process of law enforcement there can appear problems, especially if the position of the European Court on Human Rights differs from the one of the Ukrainian lawmaker in the context of certain kind of legal regulations.

<sup>50</sup> Ibidem, Preamble.

<sup>51</sup> Pursuant to Art. 46 of the Convention, States Parties "undertake to abide by the final judgments of the Court in any case to which they are parties." Hence, at the national level, states must ensure implementation of ECHR judgments by taking action to change the unjust situation of those found to have been wronged, through paying 'just satisfaction', or in other words the compensation, to the victim, abolishing or amending wrong legislation, and/or changing illegal practices.

<sup>52</sup> The Law of Ukraine No. 3477-IV (n. 52) Art. 2.

<sup>53</sup> It is worth to note that the Constitution of Ukraine and the legislation of Ukraine do not use the term 'source of law'.

### 3. The Practice of Application of International Law in the Ukrainian Legal Order

The Ukrainian judiciary has been frequently criticised for the reluctant application and the implementation of international agreements and international courts' decisions. This happens mainly due to the belief that international case law is not relevant to civil law systems<sup>54</sup> as well as lack (or non-availability) of translations of international case law and jurisprudence into Ukrainian to help judges adapt their rulings to the best European standards.

Ukrainian courts refer mainly to international agreements that are duly signed and ratified by the Verkhovna Rada of Ukraine and that are, as a result, a part of a national legislation of Ukraine. But even in these cases the correct application of international law is not guaranteed, since one of the most important impediment for application of international law by the Ukrainian judiciary is a lack of understanding of international conventions or foreign judgments by national judges. International organizations are aware of that problem and in period of the last ten years launched several projects for eliminating the incorrect application of international law.<sup>55</sup>

The practical aspects (examples) of the application of international law by the Ukrainian judiciary in this paper have been analysed with the help of the Unified State Register of Court Decisions of Ukraine<sup>56</sup> which was designed in 2006 to provide public access to decisions of all Ukrainian courts of general jurisdiction.<sup>57</sup> According to the applicable legislation, personal information on individuals who are parties to the proceedings (i.e., their name, address, identification code, telephone number, vehicle state registration number, etc.), is not publicly available and are, therefore, denoted as 'persons'.

#### 3.1. The Application of the ECtHR Case Law in Ukraine

The Ukraine's accession to the Council of Europe<sup>58</sup> as well as taking on obligations under the Convention for the Protection of Human Rights and Fundamen-

<sup>54</sup> Ukraine follows the Romano-Germanic, or, in other words, a civil law tradition.

<sup>55</sup> A good example of such support is the project jointly funded by the EU and Council of Europe "Transparency and Efficiency of the Judicial System of Ukraine" with a budget of 6 million euros which was elaborated in the period from 2008 to 2011.

<sup>56</sup> Unified State Register of Court Decisions of Ukraine (Єдиний державний реєстр судових рішень), <<http://www.reyestr.court.gov.ua>> (access: 4 January 2016).

<sup>57</sup> Only decisions rendered in 2006 or later can be found in the Unified State Register of Court Decisions of Ukraine.

<sup>58</sup> Ukraine's admission to the Council of Europe was approved by a parliamentary vote in October 1995 (Law of Ukraine No. 398/95 BP on Ukraine's accession to the Statute of the

tal Freedoms<sup>59</sup> was an important step in the development of the Ukrainian legal system. The European Convention on Human Rights gives the possibility for any individual and a legal entity whose rights and freedoms are allegedly violated to file an application to the European Court of Human Rights. Taking into account that the principal feature of this international body is that its decisions are binding, the ratification of the European Convention should be explicitly considered as the emergence of a number of serious guarantees of the rights and freedoms enshrined in the European Convention of Human Rights.

Although the States Parties to the ECHR should “undertake to abide by the final judgments of the Court in any case to which they are parties”,<sup>60</sup> not all states ensure implementation of the ECtHR judgments in their domestic legal system. According to the eighth report on the implementation of judgments of the European Court of Human Rights established by the Committee on Legal Affairs and Human Rights, Ukraine takes fourth place among the countries with the highest number of non-implemented judgments of the Court.<sup>61</sup> Ukraine also has been among the leading countries as to the number of applications of the citizens of Ukraine to the European Court of Human Rights (19.5%).<sup>62</sup>

In case of Ukraine, the problem of non-enforcement of the domestic judgments is a kind of a ‘national tradition’<sup>63</sup> or a feature of the Ukrainian legal system. The former Human Rights Ombudsman of Ukraine, Nina Karpachova, stated in her 2011 annual report that over 60 percent of all domestic court decisions and 93 percent of the decisions of the European Court of Human Rights against Ukraine had not been enforced.<sup>64</sup> In the annual reports of the next following years

---

Council of Europe), <<http://zakon2.rada.gov.ua/laws/show/398/95-%D0%B2%D1%80>> (access: 17 April 2016).

<sup>59</sup> Ukraine ratified the European Convention on Human Rights and Fundamental Freedoms in 1997.

<sup>60</sup> Art. 46(1) of the European Convention on Human Rights and Fundamental Freedoms.

<sup>61</sup> Council of Europe, ‘Implementation of judgments of the European Court of Human Rights: 8<sup>th</sup> report’, <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileId=22005#>> (access: 15 April 2016).

<sup>62</sup> Council of Europe, ‘Annual Report 2014 of the European Court of Human Rights’, <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileId=22005#>> (access: 15 April 2016).

<sup>63</sup> ‘Правозахисники: невиконання рішень судів в Україні стало національною традицією’, <<http://helsinki.org.ua/articles/pravozahysnyky-nevykonannya-rishen-sudiv-v-ukrajini-stalo-natsionalnoyu-tradytsijeyu/>> (access: 15 April 2016).

<sup>64</sup> The Ukrainian Ombudsman, ‘2011 report’, <<http://zakon3.rada.gov.ua/laws/show/n0001715-11>> (access: 15 July 2016). The original text: “Хронічним є невиконання судових рішень. Фактично виконується лише кожне третє рішення національних судів. А стосовно рішень Євросуду, то цей показник становить лише 9%”, Виступ Уповноваженого Верховної Ради України з прав людини Ніни Карпачової під час представлення у Верховній Раді України Щорічної доповіді про стан дотримання та захисту прав і свобод людини в Україні.

the Ukrainian Ombudsman only emphasizes the continuing and systemic non-enforcement of the judicial decisions in Ukraine.<sup>65</sup>

In June of 2007 the Department for Enforcement of Judgments of the European Court of Human Rights at the Committee of Ministers prepared the memorandum on “Non-enforcement of domestic judicial decisions in Ukraine: general measures to comply with the European Court’s judgments”,<sup>66</sup> which, among other things, identified the reasons for the failure to enforce the domestic court decisions in Ukraine and proposed a number of measures to “increase the efficiency of the state enforcement service and improve the procedure for compulsory enforcement.”<sup>67</sup>

In the eighth report on the implementation of judgments of the European Court of Human Rights established by the Committee on Legal Affairs and Human Rights the conclusions on the enforcement of the ECHR judgements in Ukraine were the following:

Almost no progress has been noted regarding Ukraine, which could be partly explained by the recent turmoil in this country, the annexation of Crimea by the Russian Federation and the violent conflict in eastern Ukraine, which recently prompted Ukraine to derogate from certain articles of the Convention under Article 15. Ukraine is nevertheless legally obliged to implement the Court’s judgments and the Council of Europe is ready to assist it in accomplishing this task.<sup>68</sup>

As regards the execution of ECtHR judgments by Ukraine, case *Bochan v Ukraine* (2)<sup>69</sup> very clearly shows the misrepresentation of the European Court’s findings in the Supreme Court’s of Ukraine judgments. Ms. Bochan was involved in the longstanding but ultimately unsuccessful litigation over the title to land in Ukrainian courts. In 2001 she lodged an application with the European Court complaining about unfairness in the domestic proceedings. At that time in the *Bochan v Ukraine* (1) judgment delivered on 3 May 2007<sup>70</sup> the Court found a violation of Article 6(1) of the Convention on the grounds that the domestic courts’ decisions had been reached in proceedings which failed to respect

<sup>65</sup> The Ukrainian Ombudsman, ‘Щорічна доповідь про стан дотримання та захисту прав і свобод людини в Україні’, <<http://www.ombudsman.gov.ua/ua/all-news/pr/5515-qv-schorichna-dopovid-upovnovazhenogo-pro-stan-doderzhannya-ta-zaxistu-pr/>> (access: 15 April 2016).

<sup>66</sup> Department for Enforcement of Judgments of the European Court of Human Rights at the Committee of Ministers ‘Memorandum on non-enforcement of domestic judicial decisions in Ukraine: general measures to comply with the European Court’s judgments’ (June 2007), <[https://wcd.coe.int/ViewDoc.jsp?id=1150185&Site=COE#P535\\_53329](https://wcd.coe.int/ViewDoc.jsp?id=1150185&Site=COE#P535_53329)> (access: 15 July 2016).

<sup>67</sup> Ibidem, 5.

<sup>68</sup> Council of Europe, ‘Implementation of judgments of the European Court of Human Rights: 8<sup>th</sup> report’ (n. 64) 9.

<sup>69</sup> *Bochan v Ukraine* (2), App. no. 22251/08 (ECtHR, 5 February 2015).

<sup>70</sup> *Bochan v Ukraine* (1), App. no. 7577/02 (ECtHR, 3 May 2007).

the Article 6(1) fair-hearing guarantees of independence and impartiality, legal certainty and the requirement to give sufficient reasons. It awarded the applicant EUR 2,000 as a means for compensation for the non-pecuniary damage. Relying on the European Court's judgment, Ms. Bochan then lodged an "appeal in the light of exceptional circumstances" in which she asked the Ukrainian Supreme Court to quash the domestic courts' decisions in her case and to allow her claims in full. On 14 March 2008 the Supreme Court dismissed her appeal after finding that, in line with the ECtHR's judgment (sic!), the domestic decisions were correct, lawful and well-founded.<sup>71</sup> In June 2008 it declared a further exceptional appeal lodged by the applicant inadmissible. Bochan filed another application to the ECtHR. This time her case was considered by the Grand Chamber and the decision was again adopted in favour of the applicant. But the judges of the ECtHR quite specifically accused their Ukrainian colleagues from the Supreme Court of distorting the findings of the ECtHR and of disregard for the right to a fair trial. Literally, the European Court's judgment states that "by its judgment as of March 14, 2008, the Supreme Court grossly misrepresented the findings of the Court stated in its decision as of May 3, 2007." The problem posed in this case is extremely relevant, since the Supreme Court often tries to interpret in its own way the ECtHR judgments and this leads to situations when so many judgements in Ukrainian cases are not executed. This case is very demonstrative, because it shows the attitude of Ukraine to the execution of the ECtHR judgments. It is also important that the decision in this case was made by the Grand Chamber of the European Court of Human Rights, which is another 'reminder' for the Ukrainian authorities to fulfill its international obligations.

Another problematic issue is that of reopening of court proceedings after an ECtHR judgement. In such cases the Ukrainian Supreme Court usually dismisses cases, which should have been reopened on the basis of a Strasburg judgement or the procedure is treated as a pure formality (as in *Yaremenko v Ukraine*).<sup>72</sup> As the result of the pseudo-formal review of the case by the Supreme Court of Ukraine, the applicant's forced confession, which had been central to the case, was excluded from the case file and, yet, the sentence remained the same. Given the State's

<sup>71</sup> Case 6-11319сво07 (The Supreme Court of Ukraine, 14 March 2008). Original text: "Європейський суд з прав людини у своєму рішенні також зазначив, що заявниця (ОСОБА 1), стверджуючи, що її було піддано дискримінації щодо реалізації її права власності, у супереч ст. 14 Конвенції про захист прав людини і основоположних свобод у поєднанні зі ст. 1 Першого протоколу, за результатами цивільного провадження, не надала достатніх доказів щодо цих тверджень, і дійшов висновку про те, що скарги заявниці відповідно до ст. 14 Конвенції в поєднанні зі ст. 1 Першого протоколу до Конвенції повинні бути відхилені як явно необґрунтовані відповідно до пп. 3, 4 ст. 35 Конвенції. Тобто і Європейський суд з прав людини дійшов висновку про законність і обґрунтованість судових рішень і стягнув грошову компенсацію в розмірі 2 тис. євро лише за порушення судами України 'розумних строків' розгляду справи."

<sup>72</sup> *Yaremenko v Ukraine*, App. no. 32092/02 (ECtHR, 12 June 2008).



ongoing non-compliance with its obligations, the case was yet again reviewed by the ECtHR and *Yaremenko v Ukraine* (2) judgment was issued where the Court again found a violation of the Convention.<sup>73</sup>

As to the usage of the ECtHR case law by Ukrainian courts, according to the results of the research, in 2015 the references to the ECtHR judgments could be seen most often in the court's rulings of Dnipropetrovsk region, where judges used 15 ECtHR judgements in their rulings. In total, they considered 626 cases among which there were 35 references to the *Kharchenko v Ukraine* case and 58 references to the ECtHR judgment in *Letellier v France*. In Kiev region only 124 court's rulings had references to ECHR judgments (74 administrative cases, 34 penal cases, 14 – civil cases and 2 cases that were considered by the commercial courts).

For example, in the criminal case 185/9093/15 Pavlogradski Court of the Dnipropetrovsk region decided to apply the pre-trial detention for a period of seven days as a preventive measure because of the re-committing of a criminal offense by a person.<sup>74</sup> The Court took into account the legal positions set out in paragraph 35 of the ECtHR judgment in case *Letellier v France* regarding the reasonableness of the length of the pre-trial detention of an accused person<sup>75</sup> and ruled that none of the softer preventive measures can prevent risks under Art. 177 of the Criminal Code of Ukraine as there was a danger of the accused's absconding and also it was necessary to prevent him from pressuring witnesses.

In lots of other criminal cases regarding the extension of detention<sup>76</sup> Kamyanets-Podolsky Court of the Khmelnytsky region was guided by Ukrainian laws and ECtHR judgments. Continuation of detention can be justified only if there is a particular public interest, which despite the presumption of innocence prevails over the principle of respect for freedom of an individual.<sup>77</sup> In both cases Ukrainian courts used the ECHR case-law correctly.

<sup>73</sup> *Yaremenko v Ukraine*, App. no. 66338/09 (ECtHR, 30 April 2015).

<sup>74</sup> Case 185/9093/15 (Pavlogradski Court of the Dnipropetrovsk region, 22 April 2015), <<http://www.reyestr.court.gov.ua/Review/56917570>> (access: 15 April 2016).

<sup>75</sup> *Letellier v France*, App. no. 12369/86 (ECtHR, 26 June 1991), para. 35: "It falls in the first place to the national judicial authorities to ensure that, [...] the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release."

<sup>76</sup> One of them was case 676/583/15-к (Kamyanets-Podolsky Court of the Khmelnytsky Region, 20 March 2015), <<http://www.reyestr.court.gov.ua/Review/43264390>> (access: 15 April 2016).

<sup>77</sup> *Kharchenko v Ukraine*, App. no. 34119/07 (ECtHR, 10 February 2011), para. 79.



### 3.2. References to the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963

In general, since 2006 there have been issued around 170 judgments with references to the 1961 Vienna Convention on Diplomatic Relations and only 11 that were related to the 1963 Vienna Convention on Consular Relations. Most cases refer to crimes or offenses committed by diplomatic representatives on the territory of Ukraine.

In case 757/1147/13<sup>78</sup> the employee of the Lebanese Embassy in Ukraine has committed an administrative offense: he was driving while being intoxicated. The court took into account article 31 of the 1961 Vienna Convention on Diplomatic Relations which states that diplomatic agent enjoys immunity from the criminal jurisdiction of the receiving State, as well as immunity from the civil and administrative ones. Pursuant to the court order, all administrative material on bringing to administrative responsibility for committing an administrative offense shall be returned to the Department of Traffic Police in Kyiv.

Another case referred to the compensation of damages because residents of the apartment that belonged to the Canadian Embassy in Ukraine flooded the apartment located downstairs.<sup>79</sup> The court refused to open proceedings following the provisions of the Vienna Convention on Diplomatic Relations.

References to the 1963 Vienna Convention of Consular Relations are more infrequent. For instance, one of the cases<sup>80</sup> regarded the possibility of entrance to the part of the consular premises and granting temporary access to some documents that are in possession of the Consulate General of Poland in the city of Lviv. The request was related to an investigation of a violation of public order near the premises of the Consulate General of Poland. The court found that the petition cannot be granted satisfaction given the principle of inviolability of consular premises guaranteed by Article 31 of the 1963 Vienna Convention of Consular Relations.

<sup>78</sup> Case 757/1147/13 (Pechersky District Court of Kyiv, 22 February 2013), <<http://www.reyestr.court.gov.ua/Review/53581638>> (access: 18 May 2016).

<sup>79</sup> Case 761/17721/14-ц (Shevchenkivsky District Court of Kyiv, 20 June 2014), <<http://www.reyestr.court.gov.ua/Review/39385931>> (access: 8 May 2016).

<sup>80</sup> Case 461/10593/15 (Galytski District Court of Lviv, 16 October 2015), <<http://www.reyestr.court.gov.ua/Review/52455235>> (access: 8 May 2016).

### 3.3. The importance of ‘Namibia exception’ in Judgments Regarding the Temporarily Occupied Territories of Ukraine (ICJ Advisory Opinion on Namibia of 21 June 1971)

Probably one of the best examples of the proper application of the international law by Ukrainian courts in their judgments is the usage of the principles articulated in the ICJ Advisory Opinion on Namibia of June 21, 1971 (the so-called ‘Namibia exception’) that is especially important in the times of recent dramatic events in the Eastern Ukraine. Currently, around 6 million Ukrainian citizens live on the temporarily occupied territories and in order to ensure their rights Ukrainian courts have to uphold the rights of the individual, enforce the criminal law and resolve civil disputes amongst citizens.

It is important to note that the Law of Ukraine on guaranteeing the rights and freedoms of citizens and legal regime on the temporarily occupied territory of Ukraine, that came into force on May 9, 2014 additionally ensures the rights of citizens residing on the temporarily occupied territory or persons resettled from it and determines the order of entry of persons to the temporarily occupied territory and departure from it. In the Law the Ukrainian Parliament confirms that the territory of the Autonomous Republic of Crimea and the City of Sevastopol is an integral part of the territory of Ukraine and defines the ‘temporarily occupied territory’:

Article 1. Legal status of the temporary occupied territory of Ukraine

The temporarily occupied territory of Ukraine (hereinafter – the temporarily occupied territory) is an integral part of Ukraine, which is covered by the Constitution and laws of Ukraine.

Article 3. Temporarily occupied territory

1. For the purposes of this Law temporarily occupied territory is defined as:
  - 1) the land territory of the Autonomous Republic of Crimea and the city of Sevastopol, inland waters of Ukraine of these areas;
  - 2) internal sea waters and territorial sea of Ukraine around the Crimean Peninsula, the area of the exclusive (maritime) economic zone of Ukraine along the coast of the Crimean Peninsula and adjacent to the coast of the continental shelf of Ukraine that are within the jurisdiction of the government of Ukraine in accordance with international law, the Constitution and the laws of Ukraine;
  - 3) the airspace over the territories referred to in paragraphs 1 and 2 of this part.<sup>81</sup>

<sup>81</sup> The Law of Ukraine on guaranteeing the rights and freedoms of citizens and legal regime on the temporarily occupied territory of Ukraine (Закон України від 15 квітня 2014 року № 1207-VII Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України), <<http://zakon5.rada.gov.ua/laws/show/1207-18/page>> (access: 15 May 2016).

In March 2015, the Ukrainian Parliament adopted Resolution No. 254-VIII on the recognition of individual regions, cities, towns, and villages of the Donetsk and Luhansk regions as temporarily occupied territories.<sup>82</sup>

Ukrainian courts have started to use Namibia exception in their judgments from August of 2015 (around 190 cases were considered mostly by the courts in the Eastern part of Ukraine outside of the temporarily occupied territories).

The obligation of non-recognition prevents state from giving validity to acts of the illegal regime. However, the Namibia exception allows exceptional recognition of acts of the illegal regime when that is required in order to prevent the deterioration of the situation of inhabitants of the territory. Thus, in the *Namibia Advisory Opinion* called the “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)”,<sup>83</sup> the ICJ stated that:

In general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

In case 423/1048/16-c Popasnyansky regional court judicially established the fact of a birth of a person born on 22 February 2016 in the city of Luhansk, which is considered to be a temporarily occupied territory.<sup>84</sup> Pursuant to Art. 256(1) of the Civil Procedural Code of Ukraine, the court considers the case on a birth of a person in case of impossibility to issue a birth registration by a local office of state registration of acts of civil status.<sup>85</sup> The court observed that birth registration is a fundamental right, recognized by Art. 24(2) of the International Covenant on Civil and Political Rights and Art. 7 of the Convention on

<sup>82</sup> Verkhovna Rada of Ukraine, Resolution No. 254-VIII on the recognition of individual regions, cities, towns, and villages of the Donetsk and Luhansk regions as temporarily occupied territories (Постанова Верховної Ради України від 17 березня 2015 року. № 254-VIII Про визнання окремих районів, міст, селищ і сіл Донецької та Луганської областей тимчасово окупованими територіями), <<http://zakon3.rada.gov.ua/laws/show/254-19>> (access: 15 May 2016).

<sup>83</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (South West Africa), (Advisory Opinion) (1971) ICJ Rep 16, para. 125.

<sup>84</sup> Case 423/1048/16-c, decision 56827104 (Popasnyansky regional court, 31 March 2016), <<http://www.reyestr.court.gov.ua/Review/56827104/>> (access: 15 July 2016).

<sup>85</sup> Art. 256(1) of the Civil Procedural Code of Ukraine. The original text: “Стаття 256 ЦПК України. Справи про встановлення фактів, що мають юридичне значення. Суд розглядає справи про встановлення факту народження особи в певний час у разі неможливості реєстрації органом державної реєстрації актів цивільного стану факту народження.”

the Rights of the Child. The fulfillment of the right to be registered upon birth is closely linked to the realization of many other rights. It establishes the existence of a person under law, and lays the foundation for safeguarding civil, political, economic, social and cultural rights. As such, it is a fundamental means of protecting the human rights of the individual. The court also took into account the Namibia exception under which the documents issued by the occupation authorities, such as, the registration of births, deaths and marriages should be recognized if invalidity of such documents leads to a serious violation or limitation of rights of the citizens.

In case 225/2173/16-c<sup>86</sup> the applicant appealed to the court with the request to establish the fact that his mother died on 7 March 2016 in Gorlivka. After his mother's death the applicant received medical death certificate and certificate on cause of death issued by the relevant authorities of the occupied territory. Since every act issued by the temporarily uncontrolled territory of Ukraine is invalid and does not create legal consequences, only a court decision establishing the fact of death can be the legal base for registration of death. In essence, one can register the death of his mother only through the court. The Court considered that in the case of establishing the fact that has legal significance (birth or death of a person), the court might apply the general principles ('Namibia exceptions') formulated in the decisions of the International Court of Justice if registration of birth or death of a person shall be issued by institutions at the occupied territory. Therefore, Court decided to satisfy the application to establish the fact of death.

The Namibia exception cannot be employed in order to validate acts that are contrary to the general principles of international law and it does not extend for example to the making of laws or establishing institutions that effect fundamental changes to the public order of that territory and which are designed to consolidate the control of the authorities over the area in which they apply. This principle is also reflected in the law governing belligerent occupation. Pursuant to Art. 43 of the 1907 Hague Regulations<sup>87</sup> and Art. 64 of the Fourth Geneva Convention, the occupying authorities are bound to respect the law of the occupied territory and the tribunals of the occupied territory shall continue to function. As regards the doctrine of non-recognition that covers different legal aspects of the actual application of the law of non-recognition of the regimes<sup>88</sup> the *Namibia* approach remains the most accurate exposition of the doctrine.

<sup>86</sup> Case 225/2173/16-ц, decision 57379998 (Dzerzhinsk Regional Court, 12 April 2016), <<http://www.reyestr.court.gov.ua/Review/57379998>> (access: 20 April 2016).

<sup>87</sup> The Hague Convention Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (The Fourth Hague Convention).

<sup>88</sup> See: E. Milano, 'The doctrine(s) of non-recognition: Theoretical underpinnings and policy implications in dealing with de facto regimes', European Society of International Law, <[http://www.esil-sedi.eu/fichiers/en/Agora\\_Milano\\_060.pdf](http://www.esil-sedi.eu/fichiers/en/Agora_Milano_060.pdf)> (access: 20 May 2016).

The *Namibia* advisory opinion is often used in the ECtHR case law in cases regarding occupied territories e.g. on the Turkish Republic of Northern Cyprus<sup>89</sup> or Transdniestria in Moldova.<sup>90</sup>

Importantly, on 2 February 2015 Verkhovna Rada of Ukraine adopted the Resolution no 145-VIII, under which the Ukrainian parliament approves the statement on recognition on the part of Ukraine the jurisdiction of the International Criminal Court in regard to committing crimes against humanity and military crimes by higher-ranking officials of the Russian Federation and leaders of terrorist organizations of DPR and LPR that led to particularly serious consequences and mass killings of Ukrainian citizens.<sup>91</sup> This Resolution instructed the Cabinet of Ministers of Ukraine and the Prosecutor General of Ukraine to gather the necessary materials and proper evidence base to appeal to the International Criminal Court in accordance with the Article 12(3) of the Rome Statute of the International Criminal Court on crimes against humanity and war crimes that have led to especially grave consequences and mass murder of Ukrainian citizens.

In the period from 2006 to 2016 there were 15 references to the Rome Statute of the International Criminal Court, mostly all of them were related to the dramatic events in the Eastern Ukraine.

In case 755/4705/16 which was considered by the Dniprovski District Court in Kyiv,<sup>92</sup> the applicant requests to establish the fact that his forced resettlement from the temporarily occupied territory (from the city of Donetsk) in November of 2014 was the result of aggression of the Russian Federation. The establishment of this legal fact is necessary for the applicant for the determination of his right to a fair compensation from the Russian Federation. The Court cited Art. 5 of the Rome Statute in its judgment regarding the jurisdiction of the ICC that is limited to the most serious crimes of concern to the international community as a whole. These are the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>93</sup> In the present case the Court concluded that establishment of the fact that applicant's forced resettlement in November of 2014 from the temporarily occupied territory of Donetsk was the result of the aggression of the Russian Federation is not the subject to judicial review, which is a ground for refusal in the initiation of civil proceedings.

<sup>89</sup> *Cyprus v Turkey*, App. no. 25781/94 (ECtHR, 10 May 2001).

<sup>90</sup> *Ilascu and others v Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004).

<sup>91</sup> The Resolution of Verkhovna Rada of Ukraine of 2 February 2015 No. 145-VIII on the statement on recognition on the part of Ukraine jurisdiction of the International Criminal Court in regard to committing crimes against humanity and military crimes by higher-ranking officials of the Russian Federation and leaders of terrorist organizations of DPR and LPR that led to particularly serious consequences and mass killings of Ukrainian citizens, <<http://zakon3.rada.gov.ua/laws/show/145-19>> (access: 15 May 2016).

<sup>92</sup> Case 755/4705/16 (Dniprovski District Court, 25 March 2016) available at: <<http://www.reyestr.court.gov.ua/Review/56686775>> (access: 15 May 2016).

<sup>93</sup> The Rome Statute of the International Criminal Court.

In case 263/8898/15 Zhovtnevy regional court of Mariupol sentenced a citizen of Ukraine to 5 years of imprisonment for his espionage activities and performance of other tasks of leaders of the DPR and LPR on the occupied territory of Mariupol.<sup>94</sup> The Court cited Art. 7 of the Rome Statute of the ICC emphasizing that the activity of DPR and LPR can be considered as crimes against humanity.

## 4. Conclusions

It can be stated that Ukrainian courts apply international law mostly if they have to or they want to decorate their reasoning with it, but this practice is a far echo of a constructive judicial dialogue. Ukrainian courts pay attention to the activities of international courts, because they refer to their decisions when applying international law, but rarely do they answer, i.e. revise their former practice. Even the judgments of the ECtHR do not have a strong position. Ukrainian courts do not often refer to them and there are frequent problems with their execution. In addition, Ukraine's court system is widely regarded as corrupt.<sup>95</sup> Still, Ukraine is a relatively young state and it has been going through multiple upheavals. It is on its way towards European integration surpassing challenges and dangers and carrying out comprehensive reforms. The society faces the future with hope and expects the authorities to make decisive steps to prove themselves competent and responsible to introduce rapid positive changes in all spheres of life, including that of the judicial system.

---

<sup>94</sup> Case 263/8898/15 (Zhovtnevy regional court of Mariupol, 13 August 2015).

<sup>95</sup> Ukraine remains the most corrupt country in Europe. See: Transparency International, <<http://en.interfax.com.ua/news/economic/237633.html>> (access: 10 May 2016).

# Bibliography

## I. Case law

### International courts

#### ICJ

*The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ GL No. 53, (1971) ICJ Rep. 16, ICGJ 220 (ICJ 1971), 21<sup>st</sup> June 1971

#### ECtHR

*Letellier v France*, App. no. 12369/86 (26 June 1991)  
*Cyprus v Turkey*, App. no. 25781/94 (10 May 2001)  
*Ilascu and Others v Moldova and Russia*, App. no. 48787/99 (8 July 2004)  
*Bochan v Ukraine (1)*, App. no. 7577/02 (3 May 2007)  
*Yaremenko v Ukraine (1)*, App. no. 32092/02 (12 June 2008)  
*Kharchenko v Ukraine*, App. no. 34119/07 (10 February 2011)  
*Bochan v Ukraine (2)*, App. no. 22251/08 (5 February 2015)  
*Yaremenko v Ukraine (2)*, App. no. 66338/09 (30 April 2015)

### Ukrainian courts

#### Constitutional Court of Ukraine

31-y/2003 (28 May 2003)

#### Supreme Court of Ukraine

6-11319cBo07 (14 March 2008)

#### Pavlogradski Court of the Dnipropetrovsk region

185/9093/15 (22 August 2015)

#### Kamyanets-Podolsky Court of the Khmelnytsky region

676/583/15-к (20 March 2015)

#### Pechersky district court of Kyiv

757/1147/13 (22 February 2013)

#### Shevchenkivsky District Court of Kyiv

761/17721/14-п (20 June 2014)

### **Galytski District Court of Lviv**

461/10593/15 (16 October 2015)

### **Popasnyansky regional court of the Luhansk region**

423/1048/16-ц (31 March 2016)

### **Dzerzhinsk Regional Court**

225/2173/16-ц (12 April 2016)

### **Dniprovski District Court of Kyiv**

755/4705/16 (25 March 2016)

### **Zhovtnevy District Court of Mariupol**

263/8898/15 (13 August 2015)

## **II. References**

Council of Europe, 'Annual Report 2014 of the European Court of Human Rights', <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileId=22005#>> (access: 15 April 2016)

Council of Europe, 'Implementation of judgments of the European Court of Human Rights: 8<sup>th</sup> report', <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileId=22005#>> (access: 15 April 2016)

Department for Enforcement of Judgments of the European Court of Human Rights at the Committee of Ministers 'Memorandum on non-enforcement of domestic judicial decisions in Ukraine: general measures to comply with the European Court's judgments' (June 2007), <[https://wcd.coe.int/ViewDoc.jsp?id=1150185&Site=COE#P535\\_53329](https://wcd.coe.int/ViewDoc.jsp?id=1150185&Site=COE#P535_53329)> (access: 15 July 2016)

Milano E., 'The doctrine(s) of non-recognition: theoretical underpinnings and policy implications in dealing with de facto regimes, European Society of International Law', <[http://www.esil-sedi.eu/fichiers/en/Agora\\_Milano\\_060.pdf](http://www.esil-sedi.eu/fichiers/en/Agora_Milano_060.pdf)> (access: 20 May 2016)

The Ukrainian Ombudsman, 'Щорічна доповідь про стан дотримання та захисту прав і свобод людини в Україні', <<http://www.ombudsman.gov.ua/ua/all-news/pr/5515-qv-schorichna-dopovid-upovnovazhenogo-pro-stan-doderzhannya-ta-zaxistu-pr/>> (access: 15 April 2016)

Белова О.І., 'Міжнародний договір як правова основа зовнішньоекономічних відносин України, Ученые записки Таврического национального университета им. В.И. Вернадского', Серия «Юридические науки» 2009/22

Правозахисники: невиконання рішень судів в Україні стало національною традицією, <<http://helsinki.org.ua/articles/pravozahysnyky-nevykonannya-rishen-sudiv-v-ukrajini-stalo-natsionalnoyu-tradytsijeyu/>> (access: 15 April 2016)



### III. Treaties

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

The Hague Convention of 1907, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907

The Rome Statute of the International Criminal Court

### IV. Legislation

Constitution of Ukraine adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996, <<http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> accessed> (access: 3 March 2016)

Law of Ukraine No. 1618-IV Civil Procedural Code (18 March 2004), <<http://zakon1.rada.gov.ua/laws/show/1618-15>> (access: 15 July 2016) (Civil Procedural Code of Ukraine)

Law of Ukraine No. 2747-IV The Code of Administrative Proceedings (6 July 2005), <<http://zakon1.rada.gov.ua/laws/show/2747-15>> (access: 24 February 2016)

Law of Ukraine No. 1798-XII Criminal Procedural Code (6 November 1991), <<http://zakon1.rada.gov.ua/laws/show/1798-12>> (access: 23 February 2016) (The Commercial Procedural Code of Ukraine)

Law of Ukraine No. 4651-VI The Criminal Procedural Code (13 April 2012), <<http://zakon1.rada.gov.ua/laws/show/4651-17>> (access: 22 February 2016) (The Criminal Procedural Code of Ukraine)

Law of Ukraine No. 1906-IV on international treaties of Ukraine (29 June 2004), <<http://zakon1.rada.gov.ua/laws/show/1906-15>> (access: 15 January 2016)

Law of Ukraine No. 3477-IV on execution of decisions and application of practice of the European Court of Human Right (23 February 2006), <<http://zakon1.rada.gov.ua/laws/show/3477-15>> (access: 1 March 2016)

Law of Ukraine No. 398/95 BP on Ukraine's accession to the Statute of the Council of Europe <<http://zakon2.rada.gov.ua/laws/show/398/95-%D0%B2%D1%80>> (access: 17 April 2016)

Law of Ukraine on guaranteeing the rights and freedoms of citizens and legal regime on the temporarily occupied territory of Ukraine (Закон України від 15 квітня 2014 року. № 1207-VII Про забезпечення прав і свобод громадян та правовий режим на тимчасово окупованій території України), <<http://zakon5.rada.gov.ua/laws/show/1207-18/page>> (access: 15 May 2016)

Presidential Decree No. 841/96 of 18 September 1996, <<http://zakon1.rada.gov.ua/laws/show/841/96>> (access: 15 July 2016)

Presidential Decree No. 306/2012 of 8 May 2012, <<http://zakon1.rada.gov.ua/laws/show/306/2012>> (access: 20 February 2016)

Resolution of Verkhovna Rada of Ukraine of 17 March 2015 No. 254-VIII on the recognition of individual regions, cities, towns, and villages of the Donetsk and Luhansk regions as temporarily occupied territories (Постанова Верховної Ради України від 17 березня 2015 року. № 254-VIII Про визнання окремих районів, міст, селищ і сіл Донецької та Луганської областей

тимчасово окупованими територіями), <<http://zakon3.rada.gov.ua/laws/show/254-19>> (access: 15 May 2016)

Resolution of Verkhovna Rada of Ukraine of 2 February 2015 No. 145-VIII on the statement on recognition on the part of Ukraine jurisdiction of the International Criminal Court in regard to committing crimes against humanity and military crimes by higher-ranking officials of the Russian Federation and leaders of terrorist organizations of DPR and LPR that led to particularly serious consequences and mass killings of Ukrainian citizens, <<http://zakon3.rada.gov.ua/laws/show/145-19>> (access: 15 May 2016)

Verkhovna Rada, The Declaration on State Sovereignty of Ukraine (Document No. 55-12) (16 July 1990), <<http://zakon1.rada.gov.ua/laws/show/55-12>> (access: 12 February 2016)